

March 10, 2004

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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW – Room TW-A325  
Washington, D.C. 20554

**Filed via Electronic Filing**

**Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" – WT Docket No. 03-128**

Dear Ms. Dortch:

On Tuesday, March 9, 2004, the following individuals, representing the companies or associations indicated, met at the offices of the FCC with Sam Feder, Legal Adviser to Commissioner Kevin J. Martin, to discuss issues relevant to the above-identified proceeding:

Ben Almond	Cingular
Ann Bobeck	National Association of Broadcasters ("NAB")
John Clark –	Perkins Coie LLP – Counsel to the Wireless Coalition to Reform Section 106 (the "Coalition")
Diane Cornell	Cellular Telecommunications & Internet Association ("CTIA")
Peter Connolly	Holland and Knight – Counsel to U. S. Cellular
Andre Lachance	Verizon Wireless

In this meeting, the industry representatives stated that the purpose of the meeting was to discuss with Mr. Feder some points that had recently been raised about the "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process" ("NPA") that is the subject of the above-identified proceeding.

In particular, the industry representatives discussed the provisions of the March 5, 2004 draft of the document entitled "Best Practices For Expediting The Process Of Communications Tower and Antenna Siting Review by Member Tribes of the United

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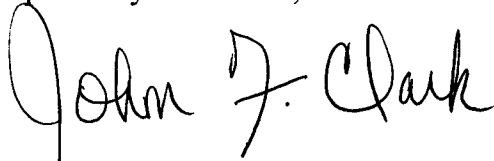
South And Eastern Tribes, Inc. and Licensees and Applicants of the Federal Communications Commission" ("Best Practices Agreement" or "BPA"). This document had been provided to industry representatives on Friday evening, March 5, 2004.

The industry representatives expressed concern that the scope of compliance requirements and Commission responsibilities that might be required in the NPA, as suggested in the Best Practices Agreement would be unreasonably complex, and further, might impose on applicants excessive and unnecessary expense and delay. Industry representatives expressed their belief that these requirements would be significantly more burdensome than what the law currently requires.

Industry representatives suggested that such a negative result might be avoided if the NPA were adopted with the section dealing with tribal participation removed, to allow further development of this section, while tribal participation would continue to be governed by current law. Industry representatives further stated that in the alternative, the NPA should incorporate language in the tribal participation section that would be as flexible as possible to allow further development of a more practical Best Practices Agreement with input from industry.

Counsel for the Coalition submitted to Mr. Feder a document, a copy of which is attached as Attachment 1, outlining industry concerns with the BPA, and similar concerns with the NPA itself, to the extent that the same or similar provisions might also appear in the NPA.

Respectfully submitted,

A handwritten signature in black ink, reading "John F. Clark". The signature is written in a cursive, flowing style. The first name "John" is written with a large, looped 'J'. The middle initial "F." is written with a small, simple 'F' followed by a period. The last name "Clark" is written with a large, looped 'C' and a trailing flourish.

John F. Clark

Counsel to the Wireless Coalition to Reform Section 106

JFC:jfc

## Attachment 1

### **Outline of Issues Supporting an Industry Request for Additional Time to Allow Further Consideration of Tribal Consultation Issues in the NPA**

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■ Many in industry are concerned that the Best Practices Agreement ("BPA") indicates that the tribal participation provisions of the NPA could significantly increase the complexity, time and expense of complying with Section 106 over what the law now requires.

■ The BPA was developed by the FCC and USET, with no meaningful opportunity for input from industry, until this week.

■ The procedures and time frames in the nominally voluntary BPA, must naturally be consistent with those in the NPA, which will be mandatory, and even voluntary BPA procedures that are FCC-endorsed will inevitably become a de facto minimum standards.

#### **Eight Serious Concerns with the Tribal Consultation Procedures Disclosed by the Draft Best Practices Agreement**

1. They extend time frames for review in every case of no tribal response from 30 days, to a minimum 88 days (three months), and perhaps much longer (nine months or more).
2. Where tribes do not respond, they require five redundant contacts to initiate consultation, and six mandatory waiting periods that the FCC cannot shorten or waive.
3. They provide a schedule for payment of fees to tribes by applicants (not by the FCC) and selectively quote the ACHP to justify an improper fee standard.
4. They unnecessarily require for every site, unless expressly waived by a tribe, a full, detailed site survey for above ground properties, using qualified professional historians, and extending the APE to the extent of what can be seen (viewshed).
5. They require for every new site, unless waived, a full archeological site survey and shovel test, using qualified archeologists with local knowledge and experience.
6. They give tribes the right to determine adverse effects and SHPO-like power to execute a previously unknown document called an MOU, before effects can be resolved.

7. They give tribes previously unknown power to reverse their positions.
8. They provide an unnecessarily overbroad scope of confidentiality (all information from the tribe or about tribal properties is confidential).

**Conclusion**

Because of the above-described problems among others, the Wireless Coalition to Reform Section 106 and other industry members strongly suggest that Section IV. of the NPA be removed from the NPA, that the Commission develop a refined Section IV and revise the BPA in consultation with industry and other stakeholders, and that in the interim, tribal participation be governed by current law.